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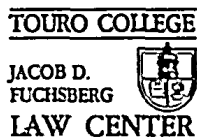
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SECTION 1983 LITIGATION

Hon. Leon D. Lazer:

Thank you, Dean Glickstein. My function here is rather limited at this point. After the first two speakers today, we will take a brief break, then continue through until noon or 12:30, when we will retire for lunch for one hour and then resume the program. The afternoon portion of the program relates to a vitally interesting segment of what the Supreme Court did in its last term, and I hope that you will remain with us to hear Professors Parker, Kaufman, and Zablotzky.

We traditionally start with one of Touro's great stars, Professor Martin Schwartz, whose column you read, no doubt, every month in the New York Law Journal. He is certainly one of the outstanding authorities in this country relative to section 1983 civil rights litigation. He is the co-author of the standard work in the field, "Section 1983 Litigation, Claims, Defenses, and Fees." He has been cited by the United States Supreme Court, and while that is important, even more important is that he is a professor at this law school. Professor Schwartz teaches constitutional law, federal courts and evidence, and is someone whose presentation is always an outstanding feature of these conferences. He is going to speak to us today, about the relevant section 1983 cases and go a little bit far afield to deal with the Eleventh Amendment and the *Seminole Tribe Indian* case. Professor Schwartz.

Professor Martin A. Schwartz:

Good morning. Thank you, Judge Lazer. There is no more important civil statute in American law than section 1983¹ because, after all, this is the mechanism that we have for enforcing the Federal Constitution against state and local government. I think that the United States Supreme Court understands the importance of Section 1983, because for the past several years, or certainly for as long as this program has been presented, the United States Supreme Court has decided a rich array of section 1983 decisions.

The decisions rendered by the Supreme Court in any given term dealing with section 1983 are typically a mixed bag. There are usually some that are pro-plaintiff² and some that are pro-defendant,³ and that was true last term as well. I have grouped the major decisions of the past term that impact upon section 1983 litigation into five areas. First, let me just list the areas, and then I will go through them.

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1. 42 U.S.C. § 1983 (1996). This section provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

2. See *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342 (1996) and *O'Hare Truck Serv. v. City of Northlake*, 116 S. Ct. 2353 (1996).

3. See *Behrens v. Pelletier*, 116 S. Ct. 834 (1996).

First, the Court rendered two important decisions dealing with First Amendment retaliation claims.⁴ Second, it issued an important decision dealing with qualified immunity appeals.⁵ Third, there was a major decision dealing with prisoners' rights, specifically their right of access to the courts.⁶ Fourth, there was a decision dealing with psychotherapist-patient privilege.⁷ And finally, as Judge Lazer previously mentioned, there was a major Eleventh Amendment decision.⁸

Let me begin with the retaliation cases. First Amendment retaliation claims constitute a large and very important subset within the universe of section 1983 actions. These retaliation claims are typically factually difficult. The defendant almost never comes into court and says, "yes, we did what we did because the plaintiff spoke out on a matter of public concern." These are often fact specific cases, and they often present difficult legal questions as well.

The plaintiffs' position in these cases is normally that the government took some commodity away from them because they chose to speak out on a matter of public concern. In some of the cases it is because of the plaintiff's political affiliation.⁹ A large

4. See *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342 (1996) and *O'Hare Truck Serv. v. City of Northlake*, 116 S. Ct. 2353 (1996).

5. See *Behrens v. Pelletier*, 116 S. Ct. 834 (1996).

6. See *Lewis v. Casey*, 116 S. Ct. 2174 (1996).

7. See *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996).

8. See *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996).

9. See *O'Hare Truck Serv. Inc. v. City of Northlake*, 116 S. Ct. at 2355. The Court in *O'Hare* held that a government official could not terminate a public employee based on his or her refusal to "support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question." *Id.* In making this determination the Court had to decide whether to extend the protections set forth in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), to independent contractors. *O'Hare*, 116 S. Ct. at 2355. *Elrod* and *Branti* provided the following standard for deciding when political party affiliation may constitute an acceptable reason for the dismissal of a public employee: "[T]he ultimate inquiry is not whether the label policymaker or confidential fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective

percentage of these cases are brought by public employees who claim, "I was fired," "I was demoted," "I was transferred," because of my exercise of free speech rights. But the claims are not limited to public employees. Others, especially in recent years, have been making increased use of the retaliation theory.

There have been cases brought, for example, by landowners who have claimed, "I've been denied a permit," "I've been denied a variance," or "the government seeks to condemn my property," or "the government isn't enforcing its zoning laws against neighboring property," because I chose to exercise my free speech rights.¹⁰ Prisoners have also filed claims, with some frequency, that disciplinary charges have been lodged against them because they exercised their right of freedom of speech or their right to assert some type of prisoner grievance.¹¹ We have also seen an increasing number of retaliation claims filed by governmental contractors who claim they have been either denied contracts or have had their contracts terminated because they exercised their free speech rights.

On the question of whether the First Amendment gives a government contractor protection against retaliation for either speaking out on a matter of public concern or because of the contractor's political affiliation, the circuit courts around the country have been split. The key issue in these cases has been whether the framework developed by the Supreme Court for retaliation claims brought by public employees is also applicable

performance of the public office involved." *Id.* at 2357 (citing *Branti*, 445 U.S. at 518).

10. See *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir. 1994) (holding that to effectively substantiate a retaliation claim under section 1983, brought for a failure to enforce zoning laws, the plaintiff must first show that his or her actions were protected by the first amendment) and *Harrison v. Springdale Water and Sewer Comm.*, 780 F.2d 1422, 1428 (8th Cir. 1986) (stating that "an individual's constitutional right of access to the courts 'cannot be impaired, either directly . . . or indirectly, by threatening or harassing an [individual] in retaliation for filing lawsuits'"). (citations omitted).

11. See *Woods v. Smith*, 60 F.3d 1161, 1163 (5th Cir. 1995) (dealing with a prisoner's allegations that prison officials "conspired to issue false disciplinary reports in retaliation for his exercise of the constitutional right of access to the courts").

for claims presented by governmental contractors. In two cases decided last term, *Board of County Commissioners v. Umbehr*¹² and *O'Hare Truck Service v. City of Northlake*,¹³ the Court ruled that governmental contractors do have the right to assert free speech First Amendment retaliation claims.¹⁴

In *O'Hare Truck Service*, O'Hare, a truck operator, was on the city's list of available towing companies for 28 years.¹⁵ The city's policy at this time was to remove a company from the list only for cause.¹⁶ During the year in question the mayor's re-election campaign committee "asked" the owner of O'Hare for a contribution to his re-election endeavor.¹⁷ O'Hare not only refused to contribute, but also decided to support the mayor's

12. 116 S. Ct. 2342 (1996). This case involved an outspoken trash hauler who was threatened by the County Board that he would lose his job. *Id.* at 2345. The Court, in determining whether the First Amendment protects independent contractors, concluded that there was no relevant difference between government employees and independent contractors that would justify totally denying contractors free speech protection against retaliation by government. *Id.* at 2352. The Court further held that both required the same balancing test to determine the First Amendment issue, adjusted to take into account the government interest in dealing with contractors rather than employees. *Id.*

13. 116 S. Ct. 2353 (1996). See footnote 9. The Court here also found that similar First Amendment treatment of government employees and independent contractors was appropriate. *Id.* at 2360.

14. See *Pickering v. Board of Educ. of Township High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563 (1968) (finding that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment"). *Id.* at 574. See also *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (concluding that in deciding whether the "speech of a government employee is constitutionally protected" the court must strike "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"). *Id.* at 574 (citing *Pickering*, 391 U.S. at 568).

15. *O'Hare*, 116 S. Ct. at 2355.

16. *Id.*

17. *Id.* at 2356. According to the allegations in the complaint, in fact, the Mayor was actually *demanding* a contribution from O'Hare, since O'Hare's refusal to contribute prompted the removal of his towing company from the city's list of available towing companies. *Id.*

opponent.¹⁸ O'Hare, in addition to supporting the opposing candidate financially, went one step further, and chose to display the opponent's campaign poster at his place of business.¹⁹ This apparently did not go over too well with the mayor, so the next thing that happened, not too surprisingly, is that O'Hare Truck Service was removed from the list of towing companies on the city's rotation list.²⁰

The United States Supreme Court ruled that the complaint in *O'Hare* stated a proper First Amendment claim under section 1983.²¹ I am going to leave it to Professor Gora to flesh out the various First Amendment aspects of these two decisions. But, I would like to explain why I think they are important to the law of section 1983.

First, they are important because I do not think there is a logical way to distinguish between a First Amendment retaliation claim asserted by a public employee and a First Amendment retaliation claim asserted by a governmental contractor. It seems to me that analytically it is the same type of claim. If there is a plausible distinction between the two, I suppose it is the distinction picked up by Justice Scalia in his dissenting opinion that political patronage and political favoritism in government contracting has, for a long time, been part of the American tradition.²² For Justice Scalia, if something is a part of American tradition, he seems to almost automatically give it the stamp of constitutional approval.²³

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 2358.

22. *Board of County Comm'rs v. Umbehr*, 116 S. Ct 2361, 2362 (1996). Justice Scalia, with Justice Thomas joining, dissented in a decision written for both *Umbehr* and *O'Hare*. *Id.*

23. *Id.* Justice Scalia stated that if tradition is not the basis of decision, the constitutional text will be susceptible to any meaning. *Id.* See also Justice Scalia's dissenting opinions in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 979-1002 (1992) (Scalia, J., dissenting) and *Lee v. Weisman*, 505 U.S. 577, 631-46 (1992) (Scalia, J., dissenting) and his plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

It is significant, however, that the majority in *O'Hare* did not accept the argument that traditional practice is automatically constitutional. In fact, the majority indicated that the so-called long-standing American tradition of patronage in government contracting has not always been noble, and in many instances has been permeated with corruption and illegality, inviting government manipulation.²⁴ The *O'Hare* situation is similar to what one might describe as a shakedown; "pay up or else."

The contractor retaliation decisions are also important considering the strong shift to privatization of government services. These decisions tell the government; "look, you are not going to be able to avoid your First Amendment obligations by labeling the service provider a contractor rather than an employee."²⁵ Finally, I think that these retaliation decisions may be important to other types of retaliation claims that section 1983 plaintiffs have been asserting because, if the Court had drawn a distinction between claims asserted by public employees and claims asserted by governmental contractors, it may have raised questions about whether those other than public employees are entitled to assert First Amendment retaliation claims. For example, the claims asserted by property owners and prisoners.

The decisions in these two cases are limited to the First Amendment rights of existing contractors.²⁶ Professor Gora, we will be interested in hearing what you have to say on this, but I do not think that there is any logical way to limit the decision to existing contractors as compared to applicants for governmental contracts. I think that on this particular point Justice Scalia was

24. *O'Hare* at 2359.

25. *Id.* The mere fact that the victims of retaliation are not labeled "employees" should not be reason to abate liability. *Id.* The Court feared that the government, by attaching different labels to jobs, could avoid constitutional liability. *Id.*

26. *See id.* at 2358-60 (discussing the right to bring a retaliation claim as a government employed independent contractor); *Umbehr*, 116 S. Ct. at 2352 (stating that "[b]ecause *Umbehr's* suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship").

right, that it is just a matter of time, just until the Court gets the next case, that the Court will hold that, just as governmental contractors cannot have their contracts terminated because they exercised free speech rights, so too applicants for governmental contracts cannot have their applications denied because the government disapproves of the free speech rights that were exercised.²⁷

Let me now move to the second area, qualified immunity. I think that the words "qualified immunity" are probably two of the most important words in section 1983 jurisprudence, and if not the two most important words, I would say that they are at least tied with the phrase "constitutional right." Certainly, the defense of qualified immunity is the most important defense, because what it does is protect a very broad array of executive and administrative officials from personal liability, so long as the officials have not violated any clearly established federal law.²⁸

The Supreme Court decisions dealing with qualified immunity go further, providing an exception to the final judgment rule that usually controls in Federal Court. This exception normally allows an official whose application for qualified immunity has

27. See *Umbehr*, 116 S. Ct at 2367-68, (Scalia, J., dissenting). Justice Scalia in his dissent stated that

[g]overnment contracting laws are clear and detailed, and whether they have been violated is typically easy to ascertain: the contract was put out for bid, or it was not. *Umbehr's* new First Amendment, by contrast, requires a sensitive "balancing" in each case; and the factual question of whether political affiliation or disfavored speech was the reason for the award or loss of the contract will usually be litigable. In short, experience under the government-contracting laws has little predictive value.

Id. at 2368.

28. See *Anderson v. Creighton*, 483 U.S. 635, 647 (1987) (holding that the defense of qualified immunity informs government officials that "they will not be held personally liable as long as their actions are reasonable in light of current American law"). See also *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (stating that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

been denied by the District Court the right to take an immediate appeal to the court of appeals.²⁹ The thinking is that the right to an immediate appeal is necessary in order to vindicate the interests protected by qualified immunity.³⁰ This is not only an immunity from liability, but an immunity from the burdens of litigation, from having to defend the lawsuit.³¹ The thinking is that, if the District Court erroneously denies a claim for qualified immunity and the official is forced to defend the case, an appeal at the end of the case would come too late.³² So the Supreme Court held that we have to give the official the right to test out the propriety of the denial of qualified immunity at the point of the denial.

Now, the problem is that officials have been pursuing these interlocutory qualified immunity appeals in record numbers and it is very costly;³³ costly in terms of the additional workload of the Courts of Appeals, and also costly to civil rights plaintiffs.³⁴ Because to be a civil rights plaintiff means that not only do I have to think about the economic costs of a possible appeal from a final judgment, but I now have to also think of the economic costs of interlocutory immunity appeals. In addition to these

29. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment").

30. *See id.* at 525-27.

31. *Id.*

32. *Id.*

33. *See Apostol v. Gallion*, 870 F.2d 1335, 1338-39 (7th Cir. 1989) (discussing the various consequences resulting from the filing of frivolous appeals on both the courts and the parties to an action).

34. *Mitchell*, 472 at 555-56 (Brennan, J., dissenting). Justice Brennan, in his dissenting opinion states his concern that the right to an immediate appeal would create an enormous burden on both the judicial system and the plaintiffs. *Id.* *See also* *Behrens v. Pelletier*, 116 S. Ct. 834, 842-47 (1996) (Breyer, J., dissenting). Justice Breyer in his analysis of the various reasons to limit immunity appeals to one interlocutory appeal stated, "[i]n sum, purpose, precedent and practicality all argue for one interlocutory appeal per case and no more." *Id.* at 847. He further stated that while qualified immunity interests may be "important enough to justify one interlocutory appeal, [they] are not important enough to justify two." *Id.*

economic costs it is also costly in terms of time, because while the interlocutory appeal is taking place, the District Court case is put on hold. The case is stayed.³⁵

Going back one year to 1995, the Supreme Court in *Johnson v. Jones*,³⁶ cut back on an official's right to pursue an interlocutory appeal from the denial of qualified immunity, holding that these interlocutory appeals lie only when the immunity issue can be decided on appeal on the basis of what the Court called a pure or neat -- the Supreme Court actually used the word neat -- neat issue of law.³⁷ Namely, can the immunity defense be decided on the question of whether there was a violation of clearly established federal law?

In contrast, the Court in *Johnson* held, that if you have a situation in which the District Court denies qualified immunity raised on a motion for summary judgment because the District Court finds that there are material issues of fact in dispute, the official does not have the right to take an immediate appeal from the denial of qualified immunity, because we do not want to burden the federal appellate courts with interlocutory appeals that

35. *Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992) (stating that the filing of an interlocutory claim "divests the district court of jurisdiction to proceed with trial . . . [and] this result could significantly disrupt and delay trial court proceedings"). *Id.* at 105.

36. 115 S. Ct. 2151, (1995). The Supreme Court, in *Johnson*, was presented with the issue of examining whether government officials have the right to "seek an immediate appeal of a district court order denying their motions for summary judgment" because there are material facts in dispute. *Id.* at 2153.

37. The Supreme Court in *Johnson* stated:

considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources, argue in favor of limiting interlocutory appeals of "qualified immunity" matters to cases presenting more abstract issues of law. Considering these "competing considerations," we are persuaded that "immunity appeals . . . interfere less with the final judgment rule if they are limited to cases presenting neat abstract issues of law."

Id. at 2158. (citations omitted).

require the unraveling of a perhaps difficult and cumbersome factual record.³⁸

Well, it seemed to me, based on the Court's analysis in *Johnson v. Jones*, that the United States Supreme Court finally saw the light. The Court, realizing what mischief interlocutory immunity appeals were causing, decided to backtrack somewhat. But, last term, in a case entitled *Behrens v. Pelletier*,³⁹ the

38. The Court in *Johnson* stated that

[w]e recognize that, whether a district court's denial of summary judgment amounts to (a) a determination about pre-existing "clearly established" law, or (b) a determination about "genuine" issues of fact for trial, it still forces public officials to trial. And, to that extent, it threatens to undercut the very policy (protecting public officials from lawsuits) that (the *Mitchell* court held) militates in favor of immediate appeals. Nonetheless, the countervailing considerations that we have mentioned (precedent, fidelity to statute, and underlying policies) are too strong to permit the extension of *Mitchell* to encompass appeals from orders of the sort before us.

Id.

39. 116 S. Ct. 834 (1996). Pelletier was dismissed from his position as managing officer of a savings and loan association after Behrens, a federal agent responsible for monitoring the operations of the savings and loan association recommended his replacement. *Id.* at 837. Behrens sought the dismissal because of his discovery that Pelletier was under investigation for possible misconduct at another financial institution. *Id.* Pelletier then brought this action seeking damages for various alleged constitutional wrongs. *Id.* Behrens claimed the defense of "qualified immunity from suit" because he was acting within his capacity as a government official. *Id.* Defendant's motion to dismiss on the basis of qualified immunity was rejected by the District Court. *Id.* On appeal, the Ninth Circuit held that "a denial of qualified immunity is an appealable final order . . . and that one such interlocutory appeal is all that a government official is entitled to and all that we will entertain." *Id.*, 837-38. (citing *Id.*, 968 F.2d 865, 870 (9th Cir. 1992)). Behrens, after further proceedings in the district court, made a subsequent motion for summary judgment "on qualified immunity grounds, contending that his actions had not violated any "clearly established right of respondent." *Id.* The District Court denied this motion, and the denial was then appealed by Behrens to the Ninth Circuit where it was dismissed "for lack of jurisdiction." *Id.* The Supreme Court was presented with the question of whether "[a] defendant's immediate appeal of an unfavorable qualified-immunity ruling on his motion to dismiss deprives the court of appeals of jurisdiction over a second appeal, also based

Supreme Court actually expanded the right of interlocutory immunity appeal.⁴⁰ So it seems that whatever insightful analysis I may have had about *Johnson v. Jones* has been undercut by *Behrens*.

Now, in the *Behrens* case, the Supreme Court held that an official who took an appeal from the denial of qualified immunity that was raised on a motion to dismiss and was unsuccessful on appeal, and then raised qualified immunity on a later motion for summary judgment and was again unsuccessful, had the right to take a second interlocutory immunity appeal.⁴¹ The United States Supreme Court, therefore, is now sanctioning multiple interlocutory immunity appeals, with one proviso, that each interlocutory appeal must present to the court of appeals, a pure question of law.⁴²

When I think about the retaliation cases and the *Behrens* qualified immunity appeal case together, it makes me wonder whether the United States has some grand master plan that attempts to create some type of equilibrium in the law of section 1983. Does the Court say to itself, "now that we've given the plaintiffs the right to pursue retaliation claims, maybe it is time to add some points to the defense side and strengthen immunity defenses?" Whether that's true or not, and of course I do not think that it is really true, I do not think there's some big chart someplace in the Supreme Court building, clearly there is no equilibrium when it comes to prisoners rights in the United States Supreme Court.

on qualified immunity, immediately following denial of summary judgment." *Id.* at 836. The Court held that it does not. *Id.* at 838-42.

40. *See supra* note 25 and accompanying text.

41. *Id.*

42. *Behrens*, 116 S. Ct at 840-41 (stating that, although there is no limit to the number of interlocutory appeals that may be filed, the possibility that this power will be abused may be limited by the requirement that such claims "turn on an issue of law" thereby allowing the courts to "weed out frivolous claims"). *Id.* at 841.

The 1977 Supreme Court decision in *Bounds v. Smith*,⁴³ ruled that prisoners have a constitutional right of access to the courts, and that this right requires the government to provide prisoners with either adequate law libraries or assistance from individuals with legal training. The lower courts have struggled with the meaning of *Bounds v. Smith*; determining for example, the extent of the right, the adequacy of the law library, and the type of legal assistance that the State must provide.⁴⁴ The issue of the extent of the right recognized in *Bounds v. Smith* came before the United States Supreme Court last term in *Lewis v. Casey*.⁴⁵

43. 430 U.S. 817 (1977). State prison inmates brought actions against the state for failing to provide adequate legal library facilities, denying them reasonable access to the courts and equal protection as guaranteed by the U.S. Constitution. *Id.* at 818. The Supreme court held that the fundamental constitutional right of access to courts requires prison authorities to assist inmates in legal matters by providing prisoners with adequate law libraries or adequate assistance from legally trained people. *Id.* at 828.

44. *See* *Blake v. Berman*, 877 F.2d 145 (1st Cir. 1989) (questioning whether a particular "access" caused a prisoner's injuries); *Germany v. Vance*, 868 F.2d 9, 11 (1st Cir. 1989) (examining whether state caseworkers unconstitutionally denied court access to a juvenile offender); *Smith v. Bands*, 841 F.2d 77, 78 (4th Cir. 1988) (inquiring into the adequacy of training provided to prisoner paralegals staffing the prison law library, the assessment of photocopy charges against prisoners unable to pay, the limitation of library privileges imposed as a disciplinary action and the practice of providing library access by means of short term transfers); *Cookish v. Cunningham*, 787 F.2d 1, 5 (1st Cir. 1986) (conducting an examination of the adequacy of the contents of the prison law library); *Harrington v. Holshauser*, 741 F.2d 66, 67 (4th Cir. 1984) (examining whether the state has complied with the directions cited in *Bounds*); *Rich v. Zitnay*, 644 F.2d 41, 42 (1st Cir. 1981) (dealing with prisoners claiming that they were without counsel or a library containing their particular state law) and *Spates v. Manson*, 619 F.2d 204, 208 (2d Cir. 1980) (discussing the inadequacies in access to legal matters); *Blake v. Berman*, 625 F. Supp. 1523, 1525 (D. Mass. 1986) (questioning whether the Dept. of Corrections Commissioners provided prisoners with adequate legal assistance despite the fact that the library did not contain the state law of a particular state, but where alternative services were available).

45. 116 S. Ct. 2174 (1996). In *Lewis*, the inmates brought a civil rights action against prison officials for violating their constitutional right of access to the courts. *Id.* at 2177. The Supreme Court decided the case on three points: (1) an inmate claiming denial of access to courts cannot establish actual injury just by proving that the prison law library or legal assistance program is not

In *Lewis v. Casey*, the Supreme Court was asked to review the propriety of the issuance by the District Court of a twenty-five page injunctive order designed to implement *Bounds v. Smith*.⁴⁶ The District Court decree detailed what exactly had to be in the law library and the type of legal assistance the State of Arizona had to provide.⁴⁷ I think that most individuals who follow the Supreme Court in the area of prisoners' rights probably were not surprised that the United States Supreme Court did not allow the twenty five page detailed decree to stand.⁴⁸ It was not completely expected, however, that the Supreme Court would dilute the prisoner right of access to the courts to the point it did or in the manner that it did, especially after recognition of the right in *Bounds v. Smith*.⁴⁹

But let me explain what I mean. First of all, the Court held that a prisoner who alleges a violation of his or her constitutional right of access to the courts has to demonstrate not only that the law library or the legal assistance program is inadequate, but has to make a further showing that the prisoner has a nonfrivolous legal claim that has been frustrated or impeded by the inadequacy.⁵⁰ The Supreme Court states that the prisoner is unable to establish injury unless the inadequacy of the law library or the legal assistance program is the cause of frustration in the assertion of a nonfrivolous claim.⁵¹ Now, if you think about it, that sets up a pretty interesting catch-22 situation. Right? How about the prisoner who says, well, look, I can't tell, I can't tell

adequate in some theoretical sense and must show that the inadequacy frustrated the prisoner's assertion of a non-frivolous claim; (2) two illiterate or non-English speaking inmates who suffered actual injury did not support systemwide injunction mandating detailed changes; and (3) delays in receiving legal assistance did not violate defendant's constitutional right of access. *Id.* at 2178-85.

46. *Id.* at 2178.

47. *Casey v. Lewis*, 834 F. Supp. 1553, 1555-69 (D. Ariz. 1992).

48. *Lewis* at 2200 (stating that systemwide relief is never appropriate when there is no systemwide violation, and even then the relief should be no broader and should last no longer than necessary to fix the constitutional violation).

49. *Id.* at 2182.

50. *Id.* at 2181.

51. *Id.* at 2182.

whether or not I have a nonfrivolous claim, because the law library is inadequate, you know, they do not have the most recent Federal Reporter, nor do they have the Federal Supplement. The Supreme Court also ruled that the prisoner's right to access to the courts only includes the means to challenge the conviction, sentence or conditions of confinement. It does not give the prisoner the right to assert any other type of legal claim.⁵²

The language used in the Court's opinion signals the feelings of the Court on the issue. Justice Scalia stated that prisoners have no right to transfer themselves into litigating engines, capable of filing everything from shareholder derivative actions to slip and fall claims.⁵³ I am not sure why a slip and fall claim in prison is not part of prison conditions. And, I asked a good friend of mine, who's been involved in prisoners' rights litigation for many years, "Do you find that prisoner shareholder derivative suits is one of the major social problems of the day?" He assured me that it absolutely is not.

I think that the Court's inclusion of "litigating engine" and "shareholder derivative" language signals its sentiments about the issue. Again, Justice Scalia is writing. Although he tends to be on the colorful side, I think you can see that the Court is taking a rather negative view of the right of access to the courts.⁵⁴

The Court also said that the *Bounds* decision must be read *in pari materia* with the deferential standard that the Court had previously articulated in a case named *Turner v. Safley*.⁵⁵ In *Turner*, the Court decided that prison policies only have to be rationally related to a legitimate penological objective and that

52. *Id.*

53. *Id.* Justice Scalia perceived, seemingly, that the prisoners' intent is to become litigating engines rather than legitimate defenders of their entitled constitutional rights. *Id.*

54. *Id.*

55. 482 U.S. 78 (1987). This case regarded the constitutionality of regulations set forth by the Missouri Division of Corrections relating to correspondence and marriages among inmates. *Id.* at 81. The Supreme Court ruled that the governing standard for determining the constitutionality of prison rules is whether the rule is reasonably related to legitimate penological objectives. The Court upheld the Division of Corrections correspondence regulation, but not the marriage regulation. *Id.*

standard is heavily deferential to the judgment of prison officials.⁵⁶ And I was sort of wondering, you know, the Court used the phrase *in pari materia*. The Justices could have just said "together." But I think they used the Latin to tell us they really mean business. To tell us they mean business, the Latin phrase comes out.

I think that when you put this whole picture together, I do not think there's a lot left to the *Bounds v. Smith* constitutional right of prisoner access to the courts. Obviously, the states have to have some type of law library or some type of legal assistance program, but I do not think we're going to see, after *Lewis v. Casey*, prisoners prevailing in too many of these cases.

Moving on, in *Jaffee v. Redmond*,⁵⁷ a section 1983 suit, the United States Supreme Court for the first time recognized a psychotherapist-patient privilege; an unqualified privilege was recognized.⁵⁸ Some of the lower federal courts that had recognized the privilege recognized it as a qualified privilege, balancing the need for the information against the need for confidentiality.⁵⁹ The Supreme Court not only held that there was an unqualified privilege, but that the privilege extended beyond the psychotherapist to less extensive, more accessible social workers.⁶⁰

56. *Id.* at 87-90.

57. 116 S. Ct. 1923 (1996) (dealing with the admissibility into evidence of statements made by a patient to a psychotherapist; whether there is a "psychotherapist privilege under rule 501 of the Federal Rules of Evidence"). *Id.* at 1925.

58. *Id.* at 1928. The Court, in concluding that such a privilege does exist, stated that "a privilege protecting confidential communications between a psychotherapist and her patient promotes sufficiently important interests to outweigh the need for probative evidence." *Id.* (citations omitted).

59. *Id.* at 1927 (finding that "[t]he United States courts of appeals do not uniformly agree that the federal courts should recognize a psychotherapist privilege under Rule 501"). *Id.* See also *In re Doe*, 964 F.2d 1325 (2d Cir. 1992) (recognizing "the existence of a [qualified] psychotherapist-patient privilege under Rule 501"). *Id.* at 1328.

60. *Id.* at 1931. The Court stated

[w]e have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the

It is interesting, at least to me, that the case arose in the context of a police officer who had used deadly force and, troubled by this use of force, then consulted a social worker. The case arose from the plaintiff seeking the notes that came out of those counseling sessions.⁶¹ Normally these types of issues come up the other way. For example, an individual sues a municipality and police officers and it is the municipal attorneys who think there is something wrong with this plaintiff who has filed suit. The municipality thinks there are one or more loose screws in the plaintiff, and it is the defendant who is seeking communications that the plaintiff had with the therapist.⁶²

Justice Scalia, in his dissenting opinion, saw in *Jaffee* very little value in consulting a therapist because, in his view, when an individual has a problem, in this country the tradition is for the individual to speak to either a relative, a friend or a bartender.⁶³ He said it. I didn't make that up.

Now, I think that this decision is important for a number of reasons. First of all, since the Federal Rules of Evidence were

course of psychotherapy . . . drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose.

Id. (citations omitted).

61. *Id.* at 1925-26.

62. See *Hancock v. Hobbs*, 967 F.2d 462 (11th Cir. 1992). This case involved a cause of action filed by Hancock against a Georgia police officer, Hobbs, for arrest without probable cause. *Id.* at 464-65. The court of appeals determined that the lower court did not err in allowing the introduction into evidence of the plaintiff's prior psychiatric treatment, holding that such evidence was not privileged against disclosure. *Id.* at 466-67. See also *Dixon v. City of Lawton, Okla.*, 898 F.2d 1443 (10th Cir. 1990) (involving the production of medical records indicating prior drug use of the plaintiff as evidence in an action for wrongful death brought against three police officers).

63. *Jaffee*, 116 S. Ct. at 1933 (Scalia, J., dissenting). Justice Scalia in his dissent stated his dissatisfaction with recognizing the psychotherapist-patient privilege by asking when "the psychotherapist came to play such an indispensable role in the maintenance of the citizenry's mental health?" In the past, before the current trend toward seeking professional counseling, people would rely on the advice of "parents, siblings, best friends and bartenders - none of whom was awarded a privilege against testifying in court." *Id.*

enacted in 1975, whenever a privilege issue came to the United States Supreme Court, the Court took a very negative view of the evidentiary privilege.⁶⁴ This has been the trend around the country; the privileges are falling into disfavor.⁶⁵ But this decision in *Jaffee*, I think, shows that the Supreme Court is willing to recognize a new evidentiary privilege when there is justification for it.⁶⁶ In recognizing this privilege, the United States Supreme Court has brought the Federal Courts into line with the decisional and statutory law of all of the other 50 states and the District of Columbia, because it turns out that every state and the District of Columbia has some type of psychotherapist-patient privilege.⁶⁷ Obviously the privileges are not the same in each State. Some are qualified, some are unqualified, some extend to social workers and some do not. Nevertheless, they all have some type of psychotherapist-patient privilege.

64. See 3 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: FEDERAL EVIDENCE § 7.2 at 238 (2d ed. 1995 and Supp. 1997) (stating that "the Supreme Court has stressed that '[e]videntiary privileges in litigation are not favored' and should be strictly construed."). (citations omitted). See generally *id.* at 238-41.

65. See *id.* at 1932-33 (Scalia, J., dissenting). Justice Scalia in his dissent in *Jaffee* summarized this attitude, stating that the Supreme Court has always, in the past, understood that the role of the courts to preserve justice "is severely harmed by contravention of 'the fundamental principle that the public . . . has a right to every man's evidence.'" *Id.* at 1933 (Scalia, J., dissenting). (citations omitted). He further stated that the testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* (citations omitted).

66. *Id.* at 1931. The Court stated:

Because we agree with the judgment of the state legislatures and the Advisory Committee that a psychotherapist-patient privilege will serve a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth,' we hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.

Id.

67. *Id.* at 1929 n.11 (providing a list of each State and appropriate statute section).

I think that the decision is also important because, Justice Scalia's view notwithstanding, the decision reflects the common wisdom that psychotherapy is only likely to be effective if the individual feels that he or she can speak freely with the therapist without fear that the communication might later be divulged.⁶⁸

Finally, I get to the major Eleventh Amendment decision of last term, *Seminole Tribe of Florida v. the State of Florida*.⁶⁹ As Judge Lazer pointed out, this is not a section 1983 case. But unlike Judge Lazer, I do not really think it takes us far afield from the law of section 1983, because I think that whatever the Supreme Court says about the Eleventh Amendment is potentially significant on the issue of section 1983 actions that attempt to establish state governmental liability.⁷⁰

68. *Id.* at 1928-29 (discussing the necessity of patient confidentiality in developing the type of relationship required for the successful treatment of psychotherapy patients).

69. 116 S. Ct 1114 (1996). *Seminole Tribe* involved the Indian Gaming Regulatory Act. This act "provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located." *Id.* at 1119. In *Seminole Tribe* the petitioner alleged that the State "refused to enter into any negotiation for inclusion of [certain gaming activities] in a tribal-state compact," thereby violating the requirement of good faith negotiation" contained in the Act. *Id.* at 1121. The Court in its decision provided that

[t]he Act, passed by Congress under the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, imposes upon the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact, §2710(d)(3)(A), and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty, § 2710(d)(7). We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued. We further hold that the doctrine of *Ex parte Young* may not be used to enforce § 2710(d)(3) against a state official.

Id. at 1119.

70. See 1 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES Ch. 8 (2d ed. 1991 and Supp. 1 & 2 1996) (providing a full discussion of state liability under the Eleventh Amendment).

Now, the decision, which is a pro Eleventh Amendment decision, favoring the state's sovereign immunity from federal court liability, was brought to you by the same five-justice majority that brought us the decision in *United States v. Lopez*.⁷¹ In *Lopez*, for the first time in 60 years, the Supreme Court held that an Act of Congress was beyond Congress's power to regulate interstate commerce.⁷² The media very quickly and very insightfully picked up on the fact that the alignment of the justices in *United States v. Lopez* and *Seminole Tribe* was exactly the same, and I think that the media correctly perceived both decisions as being part of the majority's efforts to curb the powers of the federal government -- in the case of *Seminole Tribe* the powers of the Federal Courts -- and return power to the states.⁷³

Now, what did the United States Supreme Court do in its controversial five-to-four decision? First, it reaffirmed that despite the language of the Eleventh Amendment that bars a suit by a citizen of one state against another state, the amendment applies when the plaintiff brings suit against his or her own state.

71. 115 S. Ct. 1624 (1995). In *Lopez*, Chief Justice Rehnquist wrote the majority opinions in which Justices O'Connor, Scalia, Kennedy and Thomas joined. Justice Kennedy filed a concurring opinion in which Justice O'Connor joined. Justice Thomas also filed a concurring opinion. Justices Stevens and Souter filed dissenting opinions, and Justice Breyer filed a dissenting opinion, in which Justices Stevens, Souter and Ginsburg joined. *Id.* at 1625. In *Seminole Tribe*, Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy and Thomas joined, Justice Stevens filed a dissenting opinion, Justice Souter also filed a dissenting opinion in which Justices Ginsburg and Breyer joined. *Seminole Tribe*, 116 S. Ct. at 1119.

72. *Lopez*, 115 S. Ct. at 1634. The Court in *Lopez* was asked to determine whether the Gun-Free School Zones Act exceeded the authority vested in Congress as a result of its commerce clause authority. *Id.* at 1626. The Congress, by passing this Act, "made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'" *Id.* (citing 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)). The Court held that the Act exceeds the authority given to Congress "[t]o regulate Commerce . . . among the several States . . ." *Id.* (citing U.S. Const., Art. I, § 8, cl. 3).

73. See *supra* notes 68 and 70 and accompanying text.

Forget the language of the Eleventh Amendment, it means virtually nothing.⁷⁴ In almost every significant way, the Eleventh Amendment is interpreted to mean the exact opposite of what it says.⁷⁵ And that is true in this respect also, even though the language says that federal judicial power does not include a suit by a citizen of one state against another state -- the United States Supreme Court says, no, no, no, the Eleventh Amendment also encompasses a suit brought by an individual against her own state.⁷⁶ The Court thus reaffirmed the holding in *Harris v. Louisiana*.⁷⁷

Now, you know, this is not just a technical issue. This becomes another way of saying that the Eleventh Amendment is not limited to diversity cases and applies in federal question cases, and that is why this interpretation of the Eleventh Amendment is so important. One reason that the United States Supreme Court, at least the majority, is able to construe the Eleventh Amendment in direct contrast to its language is because a majority of the justices take the position that behind the Eleventh Amendment lies a broader common law state governmental sovereign immunity.⁷⁸

74. *Id.* at 1122-24.

75. *Id.* at 1122. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.* The Court in *Seminole Tribe* further stated that the Eleventh Amendment stands for the following two part presupposition: "first, that each State is a sovereign entity in our federal system; and second, that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" *Id.*

76. See *supra* note 74 and accompanying text.

77. 134 U.S. 1 (1890).

78. *Seminole Tribe* at 1125. The Court stated

[W]e have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment . . . We think it follows a fortiori from this proposition that the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity. The Eleventh Amendment does not exist solely in order to "prevent federal court judgments

Now, the big issue in *Seminole Tribe*, if you go back to 1989, the Supreme Court had decided in *Pennsylvania v. Union Gas Company*⁷⁹ that the Congress, when it exercises its commerce power, has the authority to override the Eleventh Amendment.⁸⁰ It is another way of saying that the Congress can force a waiver of the states' Eleventh Amendment protection. But, in *Seminole Tribe*, only seven years after the 1989 decision, the United States Supreme Court overruled *Pennsylvania v. Union Gas* and held, very significantly, that Congress's power to regulate interstate commerce does not include, the power to override the Eleventh Amendment.⁸¹

There was a very long dissenting opinion by Justice Souter.⁸² Justice Souter and the majority engaged in what might be known as the battle of the first times. Justice Souter, starts out his dissenting opinion stating that this is the first time since the founding of the Republic that the Supreme Court has held that Congress has no authority to subject state government to liability in cases brought under federal question jurisdiction.⁸³ The majority responded saying, well, we have our own first time. The majority says, *Pennsylvania v. Union Gas* is the first time that the United States Supreme Court has ever held that

that must be paid out of a State's treasury," it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."

Id. at 1124. (citations omitted).

79. 491 U.S. 1 (1989) (determining that the Interstate Commerce Clause, Art. I, § 8, cl. 3, allowed Congress to abrogate state sovereign immunity because the ability to regulate interstate commerce would be "incomplete without the authority to render States liable in damages"). *Id.* at 19-20.

80. *See supra* note 76 and accompanying text.

81. *Seminole Tribe*, 116 S. Ct. at 1128. The Court stated that "the result in *Union Gas* and the plurality's rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III. We feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled." *Id.*

82. *Id.* at 1145-1185 (Souter, J., dissenting).

83. *Id.* at 1145 (Souter, J., dissenting).

Congress's commerce power entitles the Congress to override the Eleventh Amendment.⁸⁴

Now, I think that, at least for the present, the Congressional power to override the Eleventh Amendment is limited to Congressional action under Section 5 of the Fourteenth Amendment.⁸⁵ Section 5 gives Congress the power to enact appropriate legislation for the purpose of enforcing the Fourteenth Amendment.⁸⁶ And I think that if you read *Seminole Tribe* carefully, the majority decision probably is not limited to the commerce power, but I think there is a broader holding, that other than Section 5 of the Fourteenth Amendment, Congress simply does not have the power to override the Fourteenth Amendment.

Finally, the Court in *Seminole Tribe*, this is interesting, after saying, well, this is really no big deal because individuals can always get prospective relief against state government in federal court to prevent future violations of federal law under the doctrine of *Ex parte Young*.⁸⁷ But after pointing out that

84. *Id.* at 1125.

85. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). In *Fitzpatrick*, the Court "recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution." *Seminole Tribe*, 116 S. Ct. at 1125 (citing *Fitzpatrick*, 427 U.S. at 455). The Court found that § 1 of the Fourteenth Amendment provided "prohibitions expressly directed at the States and that § 5 of the Amendment expressly provided that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." *Seminole Tribe*, 116 S. Ct. at 1125. (citing *Fitzpatrick*, 427 U.S. at 453). The Court, in *Fitzpatrick*, held that "§ 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." *Id.*

86. *See supra* note 83 and accompanying text.

87. *Seminole Tribe*, 116 S. Ct. at 1132. The Court in *Seminole Tribe* stated that despite

the jurisdictional bar of the Eleventh Amendment . . . since our decision in *Ex parte Young*, we often have found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to "end a continuing violation of federal law."

Id. at 1132. (italics added for emphasis).

prospective relief to compel compliance with federal law is not barred by the Eleventh Amendment, the Court went on and held that the *Ex parte Young* remedy was not available in the case at hand.⁸⁸ In the particular case, the Native American Tribe had sought to enforce the Indian Gaming Regulatory Act,⁸⁹ IGRA (hereinafter referred to as "IGRA"). The Court said that we're not going to allow the *Young* remedy in this case, because to allow the *Young* remedy would interfere with Congress's Indian Gaming Regulatory scheme that was very carefully developed and detailed governing gambling operations on Indian reservations.⁹⁰

Now, the Court's decision does leave in place the doctrine of *Ex parte Young*.⁹¹ There was no attempt to overturn that doctrine.⁹² It is solely a ruling based upon Congressional intent, the finding that in this case, given this detailed, regulatory scheme under IGRA, that the *Young* remedy is not available.⁹³ But, I think it is important, because, as the dissenting justices pointed out, this is the first time that the United States Supreme Court has ever denied the *Ex parte Young* remedy for a violation of federal law. It certainly makes you wonder whether, down the road, the Supreme Court may be thinking about some modification of the *Young* remedy itself.⁹⁴

Thank you very much.

88. *Id.*

89. *Id.*

90. *Id.* The Court stated "[w]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Id.*

91. *Id.* at 1133 (leaving the doctrine of *Ex Parte Young* in place while concluding that it is inapplicable to the case at bar). "Under *Ex parte Young* a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law'" *Id.* at 1178. (citations omitted).

92. *Id.* at 1133.

93. *Id.* at 1133, n.17 (stating that "[c]ontrary to the claims of the dissent, we do not hold that Congress cannot authorize federal jurisdiction under *Ex parte Young* over a cause of action with a limited remedial scheme"). *Id.*

94. *Id.* at 1181 (Scalia, J., dissenting).

Hon. Leon D. Lazer:

Any questions? If there are any questions, we can reserve a couple minutes right now. Does anyone have any questions? Yes. Can you stand up? Would you speak loudly? The acoustics are peculiar in this room.

The Audience:

In view of the lineup of the justices in this latter decision, *Seminole Tribe of Florida v. Florida*, do you feel this might be a uniquely political type of decision which is ultimately based not on any strong continuing logic in the law but based on the conservative lineup that's shared by the Chief Justice?

Professor Martin A. Schwartz:

No. I do not like to use the word political. Maybe you are speaking about the same thing without using the word political. But I think it is based upon a legal philosophy that the powers of the federal courts in *Seminole Tribe*, the powers of Congress in the *United States v. Lopez*, have been extended to an unacceptable degree, and simultaneously that means that the powers of the state and local government have been intruded upon to an unacceptable degree. And I think that the attempt by this five-justice majority is to bring about simultaneous modifications by cutting back on federal power and extending state power, and they go hand in hand together. Because, for example, if you have a broader interpretation of the Eleventh Amendment and you deny the federal courts the power to grant certain relief against state government, that would leave state prerogatives more in place. The Eleventh Amendment, I think it is important to understand, is very much of a states' rights Amendment, you know. It is one of the parts of the Constitution that regulates federalism. The real question, I think, and I have no way to answer the question, is how far is this going to go. In

the next term of the Supreme Court there are cases in which the Court has granted review dealing with both of these issues. One of the cases that is up before the Supreme Court deals with the Brady Handgun Bill and the power of Congress to require municipal officials to make background checks on those who have applications to purchase handguns,⁹⁵ and that case very much deals with the relevant powers of Congress on the one hand, and local government on the other hand. Interestingly, very shortly, within a week or two after *Seminole Tribe* was decided, the Supreme Court granted certiorari in another Eleventh Amendment case dealing with Native American tribes.⁹⁶ So we will be watching next term to see where these two issues go. They are definitely within the area of balance of power between the federal government and state and local government.

95. *Printz v. United States*, Nos. 95-1478, 95-1503 (oral argument Dec. 3, 1996).

96. *Idaho v. Coeur D'Alene Tribe of Idaho*, No. 94-1474 (oral argument October 16, 1996).